because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 125 S. Ct. 2491 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 125 S. Ct. 1517 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000).

*Amici* believe that the protection of owners' rights to reasonable development are important building blocks of democracy. The appearance of *Amici* in these consolidated cases is desirable to provide the Court with a public policy perspective that Clean Water Act section 404 authority should not be interpreted to extend federal regulation to encompass virtually every body of water, no matter how remotely and tenuously "connected" to a navigable waterway and to intrude upon local land use regulation. The potential for duplicative land-use regulation by both the state and federal governments imposes significant costs on property owners and developers.

*Amici Curiæ* therefore believe that this brief provides an additional perspective which may aid the Court in determining the issues raised in the petitions of the petitioners in these consolidated cases (collectively "Petitioners"): John A. Rapanos *et al.* (the "Rapanoses") and June Carabell *et al.* (the "Carabells").

## STATEMENT OF THE CASE

*Amici* adopt the Statement of the Case contained in the Briefs of Petitioners.

## SUMMARY OF ARGUMENT

These cases deal with the extent of the United States Army Corps of Engineers' authority to regulate the dredging and filling of inland wetlands under the CWA, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). In a recent decision, this Court restricted the Corps' authority to regulate inland wetlands. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). Since then, the Corps has attempted to avoid the teaching of *SWANCC* by relying on an alternative theory – the "Hydrologic Connection Rule," that would extend regulatory authority to any wetland with a "hydrological connection," direct or indirect, with navigable waters. The Corps thereby seeks to retain its asserted authority over virtually all inland wetlands. The Court of Appeals for the Sixth Circuit held below that even though Rapanos' lands are 20 miles from "navigable-in-fact water," *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003), *cert. denied*, 451 U.S. 972 (2004), they are within the jurisdiction of the Corps under the CWA because they share a so-called "hydrological connection" with the distant rivers. This supposed "connection" between one parcel of property and a distant navigable river is remote to at least the third degree: In *Rapanos*, "[t]he wetlands are connected to the Labozinski Drain (a one hundred year-old man-made *drain*) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin *eventually* flows into Saginaw Bay and Lake Huron." 339 F.3d at 449 (emphasis added). In *Carabell*, the wetlands are "connected" by

groundwater flow through a man-made berm to an "unnamed ditch . . . connected to the Sutherland-Oemig Drain, [which] empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie." *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005). By its silence, the Court of Appeals indicated that neither the "drains" nor the "creeks" are navigable.

Moreover, the Corps' interpretation of the CWA raises serious constitutional implications under Commerce Clause jurisprudence, as reiterated by this Court in *SWANCC*. Nationwide federal wetland jurisdiction impinges on the traditional police powers of state and local governments over land-use decisions. This court should therefore interpret the CWA as limited to navigable-in-fact waterways and wetlands immediately adjacent thereto in order to avoid possible constitutional problems.

*Amici* argue that the Fifth Circuit's interpretation of the CWA, which limits the Corps' authority to wetlands that are *adjacent* to national navigable waterways, is in accord with Congress's intent as correctly set forth in this Court's precedents.

## ARGUMENT

### I. The "hydrological connection rule," which would extend the Corps' regulatory authority to all inland wetlands, is inconsistent with this Court's holding that the Corps' dredge-and-fill authority is limited to wetlands adjacent to navigable waters.

*Amici* argue that the Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA")

violate Congress's intent, as explicated by this Court in *SWANCC*, by interpreting the CWA to allow them to regulate work in wetlands that are not immediately adjacent to navigable-in-fact federal waters. Section 404 of the CWA, 33 U.S.C. § 1344, gives the Army Corps of Engineers authority to grant permits for work in wetlands, as part of its authorization to regulate dredging or filling activity in "navigable waters." The EPA is the agency charged with enforcing the CWA, including commencing administrative and court proceedings for alleged violations of Section 404 permitting rules. *Id.* The original regulations issued by the Corps under the CWA in 1974 claimed modest geographic coverage of "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1) (1975). *See SWANCC*, 531 U.S. at 168.

By 1977, the Corps had considerably expanded its asserted authority to "isolated wetlands." 33 C.F.R. § 323.2 (a) (5) (1978). *See SWANCC*, 531 U.S. at 168–69. In 1986, the Corps promulgated the "migratory bird rule" as a "regulatory clarification" of its expansive claims of regulatory authority. 51 Fed. Reg. 41217 (1986). *See SWANCC*, 531 U.S. at 164. The Corps maintained that the "migratory bird rule" extended CWA regulatory authority to any waters used as habitat for migratory birds. *SWANCC*, 531 U.S. at 164. Because migratory birds utilize virtually every wetland, the Corps used the rule to extend its authority over dredging and filling to virtually all wetlands nationwide, no matter how remote from navigable-in-fact waters.

CWA prohibits unauthorized discharges "into the navigable waters." 33 U.S.C. § 1344(a). In this Court's

jurisprudence concerning the Nation's waterways, the term of art "navigable" has had one meaning: whether the waters in question can be traversed or reasonably be made traversable by boat. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–09 (1940); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 122–23 (1921); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Just four years ago, this Court recognized that the holding of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), expanded the meaning of "navigable" slightly, but emphasized that it did not intend to "read[] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. "[W]hen a statute uses . . . a term, Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

Although this Court had said in *Riverside Bayview Homes* that the word "navigable" in 33 U.S.C. § 1344 (a) was of "limited effect," in *SWANCC* it recognized that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. This Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

In *SWANCC*, this Court restricted the Corps' expansive geographic extension of its Section 404 regulatory authority by invalidating the "migratory bird rule." *SWANCC* decided that the Corps could not interpret the CWA to exercise the authority to regulate wetlands formed by an abandoned gravel mining operation in metropolitan Chicago, simply because migratory aquatic birds used the site for habitat. *SWANCC*, 531

U.S. at 163, 171–72. The Corps had claimed that because there were commercial activities associated with migratory birds and those birds landed on the pond in question, the pond affected interstate commerce. This Court rejected that argument, finding that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171. The Court "decline[d] respondents' invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404 (a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171–72. The Court made it clear that isolated ponds are not subject to the CWA.

After *SWANCC*, the Corps and the EPA sought to limit that decision exclusively to its particular facts and the specific Corps policy at issue in *SWANCC*, the "migratory bird rule." They did not eschew their claim of virtually universal regulatory authority over wetlands; indeed, the Corps and EPA have expressly adopted an agenda to prevent any conversion of wetlands to development anywhere in the nation, irrespective of proximity to navigable waters. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, News Release (Jan. 10, 2003), *available at* http://www.usace.army.mil/inet/functions/cw/hot_topics/admin_affirm_nr.pdf. To maintain their assertion of expansive authority over wetlands wherever located, the Corps and the EPA now rely on the "hydrological connection rule" in these and other cases. In doing so, they are merely using a different vehicle to reach a result already invalidated by the *SWANCC*

decision.[2]

The "hydrological connection rule" is a Corps policy, not formally adopted as a regulation,[3] that treats wetlands as "navigable waters" under the Section 404, so long as water from the wetlands flows, however intermittently or indirectly, to navigable or tidal waters. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). The meaning of "hydrological connection," as used by the Corps and EPA as a basis of regulatory authority is open-ended and expansive. There is no discernable end point to this approach other than the inclusion of virtually every body of water.[4]

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2 The adverse effects on ordinary citizens, including Petitioners, of the Corps and EPA's overly broad and heavy-handed approach to its CWA authority were the subject of in-depth discussions during Congressional hearings shortly after the *SWANCC* decision. *See The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure*, 107th Cong. 56 (Oct. 3, 2001). *Amicus* Charles R. Johnson was one of the witnesses at the hearing.

3 The "hydrological connection rule" is an administrative interpretation of the Corps' regulation extending its Section 404 authority to waters that contribute some flow of water to navigable waterways. 33 C.F.R. § 300.5 (d). *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

4 A number of courts have held that a "hydrological connection" to navigable waters includes connection through groundwater flows. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178–80 (D. Idaho 2001) (interpreting *SWANCC*; "[T]he CWA extends federal regulatory authority over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 Envt'l L. 113, 134–35 (2003). In other courts, the EPA has urged a definition of "hydrologically connected" that would exclude groundwater flows. *See, e.g.,*

With certain limited exceptions (primarily the Great Basin area centered on Nevada and Utah)[5] virtually all the territory of the United States is within the watershed of either the Atlantic or the Pacific Ocean and therefore ultimately hydrologically connected with a navigable waterway. *See Continental Divide*, available at http://answers.com/topic/continental-divide-1&method=6; Columbia Encyclopedia, *Watershed*, available at http://www.bartleby.com/65/wa/watershe.html. The "hydrological connection rule" would expand Section 404 permitting authority to virtually all wetlands in the United States outside the Great Basin area.[6] As

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*In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003); Craig, 33 Envt'l L. at 132–34. There is, in fact, no scientific basis for distinguishing between ground and surface waters. Conservation Technology Information Center, Perdue University, *Groundwater & Surface Water: Understanding the Interaction*, available at http://www.ctic.purdue.edu/KYW/Brochures/GroundSurface.html ("About 40% of river flow nationwide (on average) depends on groundwater.... Groundwater and surface water are fundamentally interconnected. In fact, it is often difficult to separate the two because they 'feed' each other. This is why one can contaminate the other."). The Army Corps has effectively conceded that there is no rational distinction between groundwater and surface water flows by asserting authority over wetlands such as those at issue in *Carabell*, which connect to surface waters ultimately connected to navigable-in-fact waters only through groundwater flows (in this case through a man-made berm). *See Carabell*, 391 F.3d at 708–09.

5 The Great Basin includes Utah's Great Salt Lake and California's Death Valley. *See* United States Geological Survey, *Geological Provinces of the United States: Basin & Range Province*, available at http://wrgis.wr.usgs.gov/docs/parks/province/basinrange.html; *Great Basin*, available at http://www.answers.com/topic/great-basin. Precipitation falling in the Great Basin, unlike that in the rest of the nation, stays within the Great Basin watershed and fails to flow ultimately towards either the Atlantic or Pacific Oceans. *Id.*

6 A proposed federal regulation intended to assert the Corps' post-*SWANCC* Section 404 regulatory authority would have covered

noted by the United States District Court for the Eastern District of Michigan, however, the artificial ponds at issue in *SWANCC* were hydrologically connected to neighboring navigable waters, apparently Lake Michigan, presumably through groundwater flows:

> It is worth noting that the majority opinion in [*SWANCC*] repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See* [*SWANCC*], 531 U.S. at 176 n.2 (Stevens, J., dissenting). The dissent notes that the wetlands in [*SWANCC*] are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

*United States v. Rapanos*, 190 F. Supp. 2d 1011, 1014 n.3 (E.D. Mich. 2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). *Accord FD & P Ents., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 514 (D.N.J. 2003).

This Court should follow the logic of *SWANCC* as

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approximately eighty percent of all wetlands nationwide. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n.18 (2003).

interpreted by the Court of Appeals for the Fifth Circuit. The Fifth Circuit has disallowed the Corps' expansive "hydrological connection rule." *See In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) ("[T]he United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . [only] if the body of water is *actually* navigable or *adjacent* to an open body of navigable water.'" (emphasis added) (quoting *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)). *Accord FD & P Ents.*, 239 F. Supp. 2d at 526. The Fifth Circuit has given full recognition to the fact that this Court in *SWANCC* confined CWA regulatory authority to historically navigable and the tidal water bodies and wetlands abutting them:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But, we conclude that the text of the statute will not allow this.

*SWANCC*, 531 U.S. at 168 (emphasis in original). The Fifth Circuit persuasively construed Congress's intent to limit CWA regulatory authority to wetlands immediately adjacent to navigable-in-fact waters. *In re Needham*, 354 F.3d at 346.

*Amici* acknowledge that a number of other courts of appeals have agreed with the EPA and the Corps in adopting an improperly narrow reading of *SWANCC*, limiting it to the invalidation of the "migratory bird rule." *Rapanos*, 376 F.3d at 638. *Accord Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 709–10 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Reuth Dev. Co.*,

335 F.3d 598, 604 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533–34 (9th Cir. 2001); *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2000). These courts have allowed the EPA and the Corps to use an expansive "hydrological connection rule" to reassert virtually nationwide federal wetland regulation. They have dismissed as mere *dicta* this Court's teachings in *SWANCC* that criticize wide-ranging CWA Section 404 authority. *See Rapanos*, 376 F.3d at 638–39. As even environmental advocates acknowledge, however, the meaning of *SWANCC* is clear: the application of the Section 404 to wetlands not contiguous to navigable-in-fact waters is extremely limited. *See* Brian Knutsen, *Asserting Clean Water Act Jurisdiction over Isolated Waters: What Happens after the SWANCC Decision*, 10 Alb. L. Envtl. Outlook J. 155, text accompanying nn.136, 182–83, 228 (2005) (authority limited to nonnavigable waters with a "significant nexus" to actually navigable waters and "inseparably bound up" with navigable waters (quoting *SWANCC*, 531 U.S. at 167); under current regulations covered wetlands must actually be "neighboring" navigable waters).[7]

Regulatory history further supports restricted CWA authority over waters distant from and indirectly connected to navigable-in-fact waters such as those involved in these cases.

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7 "While this may allow jurisdiction over some wetlands that are not immediately adjacent in the traditional sense of the word, the majority of these isolated waters will be left outside the coverage of the current regulations." Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying n.183. *SWANCC* "seems to suggest that wetlands that are not 'adjacent' to some sort of open water—presumably a jurisdictional body of surface water—cannot be regulated under the statute. This would exclude from the CWA any waters that are not adjacent to other jurisdictional waters . . . ." *Id.* at text accompanying n.228.

As this Court has pointed out:

> [T]he Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined sec. 404 (a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120 (d) (1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." Sec. 209.260 (e) (1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

*SWANCC*, 531 U.S. at 168 (emphasis in original). The relevance of the Corps' original interpretation of the CWA to the "migratory bird rule" applies with equal vigor to the "hydrological connection" theory.

Notably, not only are the Rapanoses' and the Carabells' properties distant from navigable-in-fact waters, but the Corps has made no attempt in these cases to show that the Rapanoses' and Carabells' conduct had any adverse effect on navigation or commerce (as opposed to water quality) of the nearest navigable waterways.

## II. The dredge and fill permit requirements under Section 404 of the Clean Water Act can extend only to wetlands adjacent to actual navigable and tidal waters.

This Court in *SWANCC* acknowledged that expansive CWA regulatory authority raised significant, constitutionally based federalism issues. *SWANCC*, 531 U.S. at 172–73. The CWA rests on Congress's power to regulate navigation under the Commerce Clause, Const. Art. I, § 8, cl. 3. *See SWANCC*, 531 U.S. at 168 n.3 (nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."). *SWANCC* recognized the constitutional limitation on regulatory authority under the CWA. *SWANCC*, 531 U.S. at 173 ("Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.") (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)).

This Court has recognized that the "traditional and primary power over land and water use" resides with the States: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251 (b)). This Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618–19 (emphasis in original) (quoting *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring)). The attempted creation of a police power over the waters that are not really navigable at all, and do not have a measurable effect on the economic activities of one or more States connected to interstate commerce, goes well

beyond the constitutionally limited powers of the federal government.

*Lopez* and *Morrison* were recently construed in *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005), in which this Court reiterated the longstanding division of permissible federal regulation under Commerce Clause into three categories:

> First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

*Raich*, 125 S. Ct. at 2205 (citations omitted). *See Lopez*, 514 U.S. at 558. In *SWANCC*, the agencies relied entirely on the third category (substantially affects interstate commerce). *SWANCC*, 531 U.S. at 173. This Court rejected that argument *SWANCC*, 531 U.S. at 173.[8] Therefore, in these cases the agencies purport

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8 This Court declined to interpret the CWA to grant the agencies regulatory authority under the "migratory bird rule" because, to do so, it:

> would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

to rely primarily on "channels of interstate commerce." *Rapanos v. United States*, No. 04-1034, United States Brief in Opposition to Petition for *Certiorari* ("United States Petition Opposition Brief") at 23.[9] In substance, however, in these cases, the agencies continue to rely on the aggregate effects on downstream waters under the third category, *id.*, contrary to this Court's teaching in *SWANCC*. They have simply substituted "hydrological connection" for migratory birds in selecting the method by which they claim interstate commerce is affected.

Indeed, "channels of interstate commerce," the category now principally relied on by the agencies, was in fact dismissed as a relevant basis of CWA regulatory authority by the United States Court of Appeals for the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997), a decision presaging *SWANCC*. The court determined that, "Congress may also regulate the discharge of pollutants into *nonnavigable* waters," only "to the extent necessary to protect the use or potential use of *navigable* waters as channels or instrumentalities of interstate commerce . . . ." *Id.* (emphasis in original). In other words, the regulation of "channels of interstate commerce" must be for direct purpose of enhancing navigation and commerce, which regulation of the wetlands at issue in these cases does not

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*SWANCC*, 531 U.S. at 173 (citation omitted). At least one author has opined that, after *SWANCC*, only regulations issued pursuant to the first category (channels of interstate commerce) really apply under the CWA. *See* Knutsen, 10 Alb. L. Envtl. Outlook J. at text accompanying nn. 116–19 ("It appears that the Court views the CWA to only reach waters where jurisdiction is asserted through . . . 'the use of channels of interstate commerce.'").

9 *Raich*, which concerns solely the third category (substantially affects interstate commerce), is this largely distinguishable from these cases. *Raich*, 125 S. Ct. at 2205.

affect. The agencies claim authority, on the other hand, by asserting that any discharge of a pollutant into any water remotely hydrologically connected to a navigable water has an "aggregate" effect on "hydrological and ecological functions" downstream. United States Petition Opposition Brief at 24. As stated in *Wilson*, however, permissible federal regulation must have as its purpose the enhancement of *navigation* and *commerce*, as aspects of the federal commerce jurisdiction. 133 F.3d at 254. Hydrological and ecological aspects of water quality, on the other hand, are environmental goals primarily under the auspices of the states. 33 U.S.C. § 1251 (b).[10] Courts have repeatedly held, however, that land-use and water-use regulation is primarily a state and local concern under federalism jurisprudence: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The agencies' position in this case is thus an attempted reincarnation of their reliance on unmeasured downstream effects, which was found untenable by this Court in *SWANCC*, 531 U.S. at 173.

The federal government is a government of limited authority under the Constitution. The Commerce Clause cannot be read to grant general police powers to the federal government simply because an activity might have some remote economic consequences. *Lopez*, 514 U.S. at 567–68. The

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10 "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251 (b).

Commerce Clause regulates only "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. Congress's interstate commerce power, therefore, permits only regulation of navigation and potential navigational impacts through the CWA. *See Morrison*, 529 U.S. at 613. It is the states, on the other hand, whose police powers are primary in regard to protection of the environment.

The "hydrological connection rule," as applied in these cases, asserts federal regulatory authority over all wetlands nationwide that potentially fall in the watershed of either the Atlantic or Pacific Oceans. A subsequently withdrawn joint Corps and EPA proposal attempted to extended federal authority over 80 percent of all wetlands nationwide, negating the effect of *SWANCC*. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n. 18 (2003). Environmental advocates urged even broader coverage. *Id.* Subsequently, the EPA and Corps explicitly espoused a goal of no net loss of wetlands nationwide. United States Army Corps of Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*. The "hydrological connection rule" would result in federal police power over land use that this Court cautioned against in *SWANCC*, 531 U.S. at 574. The agencies' interpretation of the CWA would impose a land-use regime where "there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567–68.

By equating anything with a "hydrological connection" to a navigable water to "navigable water" itself, the Sixth

Circuit has completely disregarded this Court's teaching in *SWANCC* and removed all meaning from the term "navigable." Removing the obvious and correct meaning of "navigable" from the CWA raises "serious constitutional problems." *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The reasonable interpretation of the CWA, to avoid unnecessary implication of constitutional principles, should exclude federal regulatory jurisdiction over isolated inland water bodies such as those at issue in *Rapanos* and *Carabell*.

## CONCLUSION

For the reasons stated above, this Court should reverse the decisions of the Court of Appeals for the Sixth Circuit below.

Respectfully submitted,

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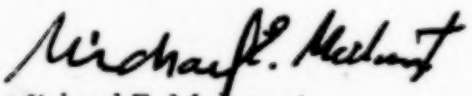
By their attorneys,



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Nos. 04-1034 and 04-1384

# In The Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; PINE RIVER BLUFF ESTATES, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,

*Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Amicus curiae is in a unique position to discuss the instant cases, since the properties in question lie in Michigan, and since one of the Center's staff members is a former head of the Michigan Department of Environmental Quality (MDEQ), the state agency that administers the Michigan wetlands program.

## INTRODUCTION AND SUMMARY OF ARGUMENT

There are estimated to be more than 100 million acres of wetlands in the contiguous United States. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005). Through its expansive regulatory definition, the Army Corps of Engineers (Corps) has claimed jurisdiction over a substantial portion of this vast acreage.

But this Court has made clear that under the Clean Water Act (CWA), Congress intended to assert jurisdiction over only those wetlands adjacent to and inseparably bound up with "navigable waters," where "navigable" means

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than the amicus curiae, its members or its counsel make a monetary contribution to the preparation or submission of this brief.

waters that are, were, or could reasonably become navigable in fact. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (*SWANCC*). None of the properties involved in the consolidated cases meets this Court's definition of federally controlled wetlands, because the instant wetlands are not adjacent to and inseparably bound up with such navigable waters. As a consequence, the Corps has no jurisdiction over the instant wetlands.

Even if this Court now finds that the Corps' claim of jurisdiction over the instant wetlands is in keeping with Congress' intent, Congress would exceed its power under the Commerce Clause when the Corps' regulation at issue, 33 C.F.R. § 328.3 (2005), is applied to the instant properties. The regulation is not limited to channels of interstate commerce, and attempts to justify the regulation by appealing to the "substantial effects" commerce test (most recently elaborated in *Gonzales v. Raich*, 545 U.S. ___; 125 S. Ct. 2195 (2005)) are not persuasive in the instant cases, because this regulation does not concern a market-related statute, as the "substantial effects" test requires.

Since all of the properties in these consolidated cases are located in Michigan, and since federal jurisdiction over the instant wetlands is improper, a review of Michigan wetlands law and regulations will likely be of some interest.[2] It is clear that Michigan's regulatory system generally mirrors the federal system, probably because Michigan's

---

[2] This discussion should not be taken to imply that amicus curiae agrees that Michigan wetlands laws and regulations represent optimal public policy.

laws must be similar to, and perhaps as stringent as, federal law in order for the state to retain a modicum of control over the fill-permitting process. Michigan's permitting system is currently under review by the Environmental Protection Agency (EPA), and the EPA has demanded that Michigan make statutory changes, promulgate specific regulations, and issue attorney general opinions with foreordained results. This review process suggests the negative effect that federal CWA jurisdiction can have on our federalist system of government when that jurisdiction is construed too broadly.

Justice O'Connor recently explained the importance of limiting the power of Congress to regulate under the Commerce Clause:

> We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

*Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

Exacerbating the federalist concerns presented in these cases is another constitutional issue: the nondelegation doctrine. Article I, Section 1 of the Constitution vests all "legislative powers herein granted . . . in a Congress of the United States." This Court has explained that the Constitution "permits no delegation of those powers."

*Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 472 (2001). But this Court has historically held that Congress can constitutionally delegate rulemaking authority to an executive agency if Congress sets forth an "intelligible principle" to which that agency must conform. *Id.* Using this intelligible principle benchmark, this Court has not used the nondelegation doctrine to strike down a single federal law since 1935. *See generally Panama Ref. Co. v. Ryan*, 293 U.S. 238 (1935); *Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935).

In *Whitman*, Justices Stevens and Souter acknowledged that rulemaking is often the functional equivalent of legislative power. 531 U.S. at 488-89 (Stevens, J., concurring). They would hold that such delegations are generally proper. Justice Thomas, on the other hand, stated that "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). He expressed willingness "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.*

The nondelegation issue is not overtly presented in either of the instant cases, since this Court granted certiorari solely on the statutory and Commerce Clause issues. But the nondelegation doctrine is worth prominent mention here since it appears that in *SWANCC*, this Court forewarned that it will not defer to agency rules that press the outer limits of Congress' constitutional power unless Congress explicitly permitted that result in legislation. *SWANCC*, 531 U.S. at 172-73. Clearly, such agency rules

are too important to be left to unelected and largely unaccountable agencies. In other words, where the limits of Congress' constitutional powers are involved, "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" This conclusion is particularly true in the instant cases, where a rule promulgated by the Corps has substantially expanded the scope of federal jurisdiction.

This *SWANCC* doctrine is laudable as far as it goes, in that it at least exempts a subset of significant questions – constitutional questions – from the control of federal agencies. Unfortunately, the decision still leaves other significant questions within federal agencies' control.

Regardless, as noted above, this Court need not reach the nondelegation issue. This Court's recent rulings make clear that the Corps has overreached in its current statutory interpretation of Congress' intent in the CWA, rendering invalid the Corps' claim of jurisdiction in the instant cases. Even if this Court does rule that the Corps has properly carried out Congress' intent by extending federal jurisdiction to the instant wetlands, Congress' action would unconstitutionally exceed the power granted to Congress under the Commerce Clause.

## ARGUMENT

### A. Background

These consolidated cases concern four properties. John Rapanos or his affiliated parties were held to be civilly liable for filling wetlands without a permit on three separate properties: Salzburg, Hines Road, and Pine

River.[3] The Carabell property owners were denied a permit to place fill on a single property. In both cases, the petitioners claim that federal jurisdiction does not extend to their property; therefore, even if there are wetlands on the properties, those wetlands cannot be regulated by the Corps.

An issue in these cases is the proper meaning of "navigable waters," which for purposes of the CWA, was defined by Congress as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).[4] The Corps was delegated the responsibility to further define "waters of the United States." The pertinent part of the Corps' current (and overly expansive) definition is:

> (a) The term waters of the United States means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of

[3] John Rapanos also was criminally convicted for improperly placing fill on the Salzburg property. The criminal conviction is not at issue here.

[4] The history of the CWA and of the federal regulations regarding the Corps' definition of "navigable waters" and/or "waters of the United States" will be discussed in more detail below.

which could affect interstate or foreign commerce including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3 (2005).

It is unclear whether water from the Carabell petitioners' property ever reaches water that meets the definition in (a)(1).[5] The magistrate judge's recommendation, which was accepted in its entirety by the district court, described the property as follows:

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[5] As will be discussed below, in *SWANCC*, this Court has clearly held that Congress meant to regulate waters that meet the (a)(1) definition and those wetlands adjacent to and inseparably bound up with such waters.